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**Alan D. Tooley d/b/a Al Tooley and International Brotherhood of Electrical Workers, Local Union No. 363, AFL-CIO. Case 2-CA-27674**

July 12, 1996

## DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING  
AND COHEN

Upon a charge filed by the Union on July 29, 1994, the General Counsel of the National Labor Relations Board issued a complaint on October 31, 1994, against Alan D. Tooley d/b/a Al Tooley, the Respondent, alleging that it has violated Section 8(a)(1) and (3) of the National Labor Relations Act. By letter dated January 17, 1995, the Respondent filed an answer to the complaint.

On July 12, 1995, the Regional Director approved a settlement agreement entered into by all parties. The Respondent failed to adhere to the terms of the settlement agreement, however, and an Order revoking the settlement agreement and reissuing the complaint issued on October 17, 1995.

Thereafter, on March 4, 1996, the Respondent entered into a second settlement agreement in which the Respondent agreed to make six installment payments to alleged discriminatees Clifford White and Joseph Gallo, to be received by the Region no later than the 20th of the month, beginning in March 1996 and ending August 1996. The March 4, 1996 settlement stipulation further provided as follows:

The Charged Party agrees that in the case of non-compliance with any of the terms of this Settlement Agreement by the Charged Party, including but not limited to failure to make timely installment payment of moneys as set forth above, and after 15 days notice from the Regional Director of the National Labor Relations Board, on motion for summary judgment by the General Counsel, the Answer of the Charged Party shall be considered withdrawn. Thereupon, the Board shall issue an Order requiring the Charged Party to show cause why said motion of the General Counsel should not be granted. The Board may then, without necessity of trial, find all allegations of the Complaint to be true and make findings of fact and conclusions of law consistent with those allegations adverse to the Charged Party on all issues raised by the pleadings. The Board may then issue an Order providing a full remedy for the violations so found as is customary to remedy such violations, including but not limited to the provi-

sions of this Settlement Agreement. The parties further agree that a Board Order and a U.S. Court of Appeals Judgment may be entered hereon.

The Respondent submitted two checks for the first installment payment due March 20, 1996, but thereafter the Region did not receive any further monthly payments. The Region mailed the Respondent a letter dated May 1, 1996, alerting it that it was not complying with the terms of the settlement agreement and allowing him until May 9, 1996, to mail the installment payment due April 20, 1996. Because no payments were received, the Region informed the Respondent by certified mail on May 10, 1996, that it was in violation and gave the Respondent 15 days to comply.

No additional payments having been received from the Respondent, on June 6, 1996, the General Counsel filed a Motion for Summary Judgment and Issuance of Decision and Order and Petition in Support with the Board. The General Counsel submits that the Respondent failed to comply with the March 4, 1996 settlement agreement by failing to make required payments, that the Respondent has been provided notice of its default, and that its answer should therefore be considered withdrawn. On June 10, 1996, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed no response. The allegations in the motion are therefore undisputed.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

### Ruling on Motion for Summary Judgment

Sections 102.20 and 102.21 of the Board's Rules and Regulations provide that the allegations in the complaint shall be deemed admitted if an answer is not filed within 14 days from service of the complaint, unless good cause is shown. In addition, the complaint affirmatively notes that unless an answer is filed within 14 days of service, all the allegations in the complaint will be considered admitted. Further, the undisputed allegations in the Motion for Summary Judgment disclose that although the Respondent initially filed an answer to the complaint, it subsequently entered into a settlement agreement which provided for the withdrawal of the answer in the event of noncompliance with the settlement agreement, and such noncompliance has occurred. Accordingly, we find that the Respondent's answer has been withdrawn by the terms of the March 4, 1996 settlement agreement, and that, as further provided in that settlement agreement, all the allegations of the complaint are true.<sup>1</sup>

Accordingly, we grant the General Counsel's Motion for Summary Judgment.

<sup>1</sup> *U-Bee, Ltd.*, 315 NLRB 667 (1994).

On the entire record, the Board makes the following

#### FINDINGS OF FACT

##### I. JURISDICTION

At all material times, the Respondent has been owned by Alan D. Tooley, a sole proprietorship, doing business as Al Tooley. At all material times, the Respondent, with an office and place of business in Montague, New Jersey, has been engaged as an electrical contractor in the construction industry. In the calendar year 1994, the Respondent, in conducting its business operations performed services valued in excess of \$50,000 in the State of New York, including at a worksite located at 208 North Street, Middletown, New York (the Respondent's jobsite). We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

##### II. ALLEGED UNFAIR LABOR PRACTICES

At all material times Clifford White and Joseph Gallo have been members of the Union. About July 1994, White and Gallo were employed by the Respondent at the Respondent's jobsite. About July 21, 1994, the Respondent discharged White and Gallo because of their membership in the Union, and, since that date, has failed and refused to reinstate or offer to reinstate them to their former positions of employment. The Respondent engaged in this conduct because White and Gallo joined and assisted the Union and engaged in concerted activities, and to discourage employees from engaging in these activities.

#### CONCLUSION OF LAW

By the acts and conduct described above, the Respondent has been discriminating in regard to the hire or tenure or terms or conditions of employment of its employees, thereby discouraging membership in a labor organization, and has thereby engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (3) and Section 2(6) and (7) of the Act.

#### REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, having found that the Respondent has violated Section 8(a)(3) and (1) by discharging and refusing to reinstate White and Gallo, we shall order the Respondent to offer these discriminatees immediate and full reinstatement to their former jobs, or, if those jobs no longer exist, to substantially equivalent positions, with-

out prejudice to their seniority or any other rights or privileges previously enjoyed, and to make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). The Respondent shall also be required to expunge from its files any and all references to the unlawful discharges, and to notify the discriminatees in writing that this has been done.

#### ORDER

The National Labor Relations Board orders that the Respondent, Alan D. Tooley d/b/a Al Tooley, Montague, New Jersey, its officers, agents, successors, and assigns, shall

##### 1. Cease and desist from

(a) Discharging employees because of their membership in the International Brotherhood of Electrical Workers, Local Union No. 363, AFL-CIO or failing or refusing to reinstate or offer to reinstate them to their former positions of employment because they join or assist the Union or engage in concerted activities, or to discourage employees from engaging in these activities.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

##### 2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Clifford White and Joseph Gallo immediate and full reinstatement to their former jobs, or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make Clifford White and Joseph Gallo whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of this decision.

(c) Within 14 days from the date of this Order, expunge from its files any and all references to the unlawful discharges and within 3 days thereafter notify the discriminatees in writing that this has been done and that the discharges will not be used against them in any way.

(d) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in Montague, New Jersey, copies of the

attached notice marked "Appendix."<sup>2</sup> Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 29, 1994.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. July 12, 1996

William B. Gould IV,	Chairman
Margaret A. Browning,	Member
Charles I. Cohen,	Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

<sup>2</sup>If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

## APPENDIX

### NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT discharge employees because of their membership in the International Brotherhood of Electrical Workers, Local Union No. 363, AFL-CIO or fail or refuse to reinstate or offer to reinstate them to their former positions of employment because they join or assist the Union or engage in concerted activities, or to discourage employees from engaging in these activities

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Clifford White and Joseph Gallo immediate and full reinstatement to their former jobs, or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Clifford White and Joseph Gallo whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, less net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, expunge from our files any and all references to the unlawful discharges, and WE WILL, within 3 days thereafter notify the discriminatees in writing that this has been done and that the discharges will not be used against them in any way.

ALAN D. TOOLEY D/B/A AL TOOLEY